SUPREME COURT, U. S.

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

COMES NOW, appellant, Leroy Powell, appealing from the final judgment of the County Court at Law No. 1 of Travis County, Texas, entered on April 7, 1967, convicting appellant of the offense of being in a state of intoxication in a public place, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

Opinions Below

There was no formal opinion of the County Court. The oral decision is contained in the trial transcript[1]

[1] The certified transcript is hereinafter abbreviated "Tr.," followed by the page reference.

at page 42 of the Statement of Facts.* The final Judgment and the trial court's Findings of Fact and Conclusions of Law are reproduced in Appendix A to this Statement. Appellant's Motion to Quash the Complaint, Motion for Judgment and Amended Motion for New Trial are reproduced in Appendix B to this Statement.

Jurisdiction

On April 5, 1967, in the County Court at Law No. 1 of Travis County, Texas, appellant was tried and found guilty of the offense of being in a state of intoxication in a public place in violation of Art. 477, Texas Penal Code (*infra,* p. 4). On April 7, 1967, the final Judgment was entered and appellant's Amended Motion for New Trial was overruled. (Tr. 19, 22). Notice of Appeal to the Supreme Court of the United States was filed on June 15, 1967, in the County Court at Law No. 1 of Travis County, Texas (Tr. 25). Appellant's defense, properly raised by Motion to Quash the Complaint (Tr. 10), Motion for Judgment (Tr. 13), and Amended Motion for New Trial (Tr. 20), was that because he was a chronic alcoholic, to stigmatize appellant as a criminal under Art. 477, Texas Penal Code, was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

No review of the substantial federal question presented in this case is available in any higher Texas court. In Texas, final appellate jurisdiction of criminal cases tried in the county courts at law is vested

*The Statement of Facts, although a part of the trial transcript, is submitted under separate cover and hereinafter is abbreviated "S.F.," followed by the page reference.

in the Court of Criminal Appeals. However, Article 4.03, Texas Code of Criminal Procedure (*infra,* p. 4) provides that when a case has been appealed from an inferior court to the county court at law, the Court of Criminal Appeals shall not have appellate jurisdiction when the fine imposed by the county court at law does not exceed one hundred dollars.

On appeal from the Corporation Court of the City of Austin, Texas, appellant was convicted in the County Court at Law No. 1 after a trial *de novo* for being intoxicated in a public place pursuant to Article 477, Texas Penal Code (*infra,* p. 4), which specifically provides that the fine for this offense shall not exceed one hundred dollars. The fine imposed on appellant was fifty dollars.

Therefore, this case involves a judgment by the highest available court of a State in a case in which the validity of a State statute was drawn in question as being repugnant to the Constitution of the United States and the decision was in favor of its validity. Under these circumstances, jurisdiction to review the judgment of the County Court by appeal is conferred on this Court by 28 U.S.C. § 1257 (2). It was because of this same finality of judgment in the County Court of Lamar County, Texas, that this Court had appellate jurisdiction in *Largent v. Texas,* 318 U.S. 418 (1943). Jurisdiction is further sustained by the following decisions: *Robinson v. California,* 370 U.S. 660 (1962); *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

Constitutional Provisions and Statutes Involved

Constitutional Provisions:

Eighth Amendment, United States Constitution:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Vernon's Penal Code, Art. 477, Vol. 1, p. 497 (1925):

> "Art. 477. Drunk in public place.
>
> Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Vernon's Code of Criminal Procedure, Art. 4.03, Vol. 1, p. 141 (1965):

> "Art. 4.03. Court of Criminal Appeals.
>
> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the

county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars."

Question Presented

The question presented by this appeal is:

Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution.

Statement

On December 19, 1966, appellant was arrested and charged with being found in a state of intoxication in a public place. (Tr. 2). He was tried, found guilty, and fined $20.00 on December 20, 1966, in the Corporation Court of the City of Austin, Texas. (Tr. 2). Appellant appealed the conviction to the County Court at Law No. 1 of Travis County, Texas, where, following a trial *de novo* on April 5, 1967, he was found guilty and fined $50.00. (Tr. 19).

Appellant's story is not atypical of the stories of many Americans who are afflicted with the disease of chronic alcoholism. At the time of his trial he was 66 years old with a history of drinking dating back to 1925. (S.F. 30, 31). He estimated he has been arrested for being drunk approximately 100 times. (S.F. 32). In Travis County alone, the records reflect 73 arrests since 1949. (Ex. 1).

Appellant drinks every day and gets drunk about once each week. (S.F. 31). He earns an average of $12.00 a week working in a tavern shining shoes. (S.F.

30, 33). Instead of using his meager earnings to purchase groceries or support his family, he uses his $12.00 of weekly earnings to purchase more liquor. (S.F. 33). Indeed, the amount of fines imposed on appellant for being drunk in 1966 exceed 20% of his total earnings. He remembers at least two jobs he has lost because of his drinking problem and readily admits that he has no control of his drinking. (S.F. 34). In fact, he was arrested for being drunk pending the appeal of this case from the Corporation Court to the County Court at Law. (S.F. 35). In short, appellant is an alcoholic who would like to be medically treated but is without sufficient financial resources to seek such help. (S.F. 33). And given the ability to choose, his appearance in public in a state of intoxication would not be voluntary. (S.F. 35).

Dr. David Wade, a nationally recognized psychiatrist, author and lecturer on alcoholism, testified on appellant's behalf. (S.F. 7). After examining and interviewing appellant, Dr. Wade diagnosed his condition as "chronic alcoholic." (S.F. 20). Dr. Wade stated that alcoholism is a disease which destroys the alcoholic's ability to refrain from constant, excessive consumption of alcohol. (S.F. 14). Dr. Wade further stated that once a person is afflicted with the disease of alcoholism, his appearance in public in a state of intoxication would not only be involuntary on his part, but is symptomatic of the disease of chronic alcoholism. (S.F. 15).

With regard to the specific conduct of the appellant, Dr. Wade stated that he does not have the will power to resist the constant, excessive consumption of alco-

hol and that his appearance in public in a state of intoxication is involuntary. (S.F. 20).

Based upon the uncontradicted testimony presented on appellant's behalf, the trial judge entered the following Findings of Fact:

> "1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> 2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> 3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." (Tr. 17)

By Motion to Quash the Complaint (Tr. 10), Motion for Judgment (Tr. 13) and Amended Motion for New Trial (Tr. 20), appellant unsuccessfully contended that his conviction for being in a state of intoxication in a public place was barred by the cruel and unusual punishment clause of the Eighth Amendment, as made applicable to the States by the Fourteenth Amendment. The trial judge rejected this contention and entered the following Conclusion of Law:

> "1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (Tr. 17).

The Question Is Substantial

This appeal squarely presents an important constitutional question not previously considered or decided by this Court. The County Court at Law No. 1 of Travis County, Texas, has held that the Eighth Amendment does not preclude the State from criminally punishing the involuntary consequences of being afflicted with a disease.

Appellant's contention is limited to the situation presented by this appeal, where the defendant is afflicted with the disease of chronic alcoholism which destroys his will power to resist the constant, excessive consumption of alcohol and his appearance in public in a state of intoxication is not of his own volition. Appellant submits that any statute which criminally punishes the afflicted person for conduct over which he has no control is unconstitutional in violation of the Eighth Amendment's mandate prohibiting the infliction of cruel and unusual punishment.

The decision below squarely conflicts with two recent decisions by United States Courts of Appeals. The Court of Appeals for the Fourth Circuit and four of the eight judges of the Court of Appeals for the District of Columbia Circuit have held it is cruel and unusual punishment—forbidden by the Eighth and Fourteenth Amendments—to criminally punish a chronic alcoholic for being intoxicated in a public place.

In *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), the court squarely sustained the contention now presented to this Court. In *Driver* the court stated:

> "This addiction—chronic alcoholism—is now almost universally accepted medically as a disease.

> The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine." 356 F.2d at 764.

The court concluded its analysis that a State could not constitutionally inflict punishment for an illness as follows:

> "*Robinson v. State of California,* supra, 370 U.S. 660, 82 S.Ct. 1417 (1962), sustains, if not commands, the view we take. While occupied only with a State statute declaring drug addiction a misdemeanor, the Court in the concurrences and dissents, as well as in the majority opinion, enunciated a doctrine encompassing the present case. The California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari ratione, the *Robinson* decision condemns the North Carolina law when applied to one in the circumstances of appellant Driver. All of the opinions recognize the inefficacy of such a statute when it is enforced to make involuntary deportment a crime." 356 F.2d at 764-765.

In *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966), the Court of Appeals sitting *en banc,* held that a chronic alcoholic cannot be convicted for being drunk in public because his disease has destroyed his capacity to remain sober. Four of the judges rested

their holding primarily on a 1947 Congressional Act which defined "chronic alcoholic" as a person who, *inter alia,* "has lost the power of self control with respect to the use" of alcoholic beverages. However, four judges adopted a broader ground of decision:

> "Our decision would be the same were we without the guidance furnished by the Act of 1947. One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public. . . ." 361 F.2d at 53.

The court, discussing the applicability of *Robinson v. California, supra,* noted:

> ". . . Since, as we have seen, public intoxication of a chronic alcoholic is not a crime, to convict one of it as though it were would also be cruel and unusual punishment. . . ." 361 F.2d at 54-55.

Relying on the precedential authority of *Driver, supra,* the court held:

> ". . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment." 361 F.2d at 55.

The social and legal importance of the *Driver* and *Easter* decisions have been recognized with a wealth of commentary. See: Judice, *Public Intoxication,* 30 Tex. Bar J. 341 (1967); Murtagh, *Arrests for Public Intoxication,* 35 Fordham L. Rev. 1, 7-13 (1966); New York State Bar Ass'n. Committee on Public Health, *Report on Alcoholism* (Dec. 31, 1966); Note, *Alcoholism, Public Intoxication and the Law,* 2 Colum. J. of L. & Soc. Prob. 109 (1966); Note, *Cruel and Unusual Punishment — Alcoholism as a Defense to a*

Charge of Public Intoxication, 41 Tulane L. Rev. 140 (1966); Note, 1966 Duke L. J. 545 (1966); Comment, 4 Houston L. Rev. 276 (1966); Comment, 18 S.C. L. Rev. 504 (1966); Note, 12 Wayne L. Rev. 879 (1966); Note, 52 Cornell L. Q. 470 (1967); Note, 27 La. L. Rev. 340 (1967); 33 Brooklyn L. Rev. 324 (1967); 8 Ariz. L. Rev. 351 (1967); 12 S. Dak. L. Rev. 142 (1967); 46 B.U. L. Rev. 409 (1966); 15 Catholic U. L. Rev. 259 (1966); 54 Geo. L. J. 1422 (1966); 55 Ky. L. J. 201 (1966); 44 N.C. L. Rev. 818 (1966); 3 Tulsa L. J. 175 (1966); 11 Vill. L. Rev. 861 (1966); 23 Wash. & Lee L. Rev. 402 (1966); 7 Wm. & Mary L. Rev. 394 (1966); 13 Howard L. J. 203 (1967); 19 Ala. L. Rev. 183 (1966); and 2 Ga. St. Bar J. 239 (1965).

The statutes involved in the *Driver* and *Easter* cases are substantially indistinguishable from Art. 477, Texas Penal Code. The conduct prohibited was the same: being intoxicated in a public place. If the Eighth Amendment protects chronic alcoholics against conviction for public intoxication in the Fourth and District of Columbia Circuits, so also it should reach chronic alcoholics in Texas.

The President of the Texas Association of Municipal Judges, Judge Judice of Houston, Texas, has recently reported on a study of treatment given chronic alcoholics in the Houston Corporation Courts. In this report the magnitude of the alcoholic problems in Houston, Texas, alone was pointed out by resorting to the following statistics.

> "Of the 61,985 arrests made by the Houston Police Department in 1966, 26,453 were for public intoxication. Of these 26,453 arrests, approximately 65% to 70% were made among the bottom

10% of the alcoholic community—the 'skid-row bum,' the 'wino,' the 'sociopathic-hobohemian'—that is, the homeless and institutionalized alcoholic. The mere number of arrests indicates that this is a problem not only for the courts, the bar, and the police, but also for the community at large." 30 Tex. Bar J. at 341-342.

The inhumanity and total futility of imposing criminal punishment on chronic alcoholics has long been recognized as a serious problem which affects every aspect of society. As recent as February, 1967, the President's Commission on Law Enforcement and Administration of Justice has stated:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U. S. Crime Commission Report* at 235. (1967).

The President's Commission on Crime in the District of Columbia reported that in 1965, 44,218 arrests were made in the District of Columbia for violations of the public intoxication law. The Commission concluded:

> "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474. (1967).
>
> "The practice of dealing with destitute public inebriates as criminals has proven to be expensive, burdensome and futile. . . .
>
> "Moreover, criminal procedures did not serve as a deterrent. . . . The resort to criminal sanctions has completely failed. Periodic commitments

to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness. . . ." Id. at 485-486.

"For these unfortunate people, simple humanity demands that we stop treating them as criminals and provide voluntary supportive service and residential facilities so that they can survive in a decent manner." Id. at 501.

The *Easter* and *Driver* decisions have resulted in similar litigation throughout the country. Cases raising chronic alcoholism as a defense to a charge of public intoxication are now pending in three State supreme courts: *Seattle v. Hill,* Washington Supreme Court, No. 39050, argued on March 28, 1967; *People v. Hoy,* Michigan Supreme Court, No. 51563; *Commonwealth v. Owens,* Middlesex Superior Court, Docket No. 74393, on certification to the Massachusetts Supreme Judicial Court. Similar cases are pending or have recently been tried in trial courts in Atlanta, Georgia; Columbus, Ohio; and St. Paul, Minnesota. Other test cases involving this issue are in various stages of preparation.

This Court declined to grant a writ of certiorari in *Budd v. California,* Calif. Sup. Ct., January 6, 1966 (unreported); *cert. denied,* 385 U.S. 909 (1966), the only similar case that has come before it. While the procedural defects in that case made it a poor case for review, the clear and complete record in the instant case provides an appropriate vehicle for considering and deciding the single constitutional issue presented, and for resolving the conflict between different jurisdictions that has arisen on this issue. Litigation will continue throughout the country until this Court resolves this issue.

Conclusion

For the foregoing reasons, the question presented by this appeal is substantial and is of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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